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OFFICE OF PETITIONS

In re Patent No. 7,678,759	:	DECISION
SONTHEIMER et al.	:	DISMISSING REQUEST FOR
Issue Date: May 16, 2010	:	RECONSIDERATION OF PATENT
Application No. 10/686,782	:	TERM ADJUSTMENT
Filed: October 17, 2003	:	UNDER 37 CFR 1.705(d)
Attorney Docket No. 2006636-0064	:	

This is a decision on the RESPONSE TO DECISION DISMISSING REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(d), filed October 14, 2010, which is being treated as a petition under 37 CFR 1.705(d) requesting that the patent term adjustment indicated on the above-identified patent be corrected to indicate that the term of the above-identified patent is extended or adjusted by six hundred seventeen (617) days.

The petition to correct the patent term adjustment indicated on the above-identified patent is **DISMISSED** with respect to making any change in the patent term adjustment determination under 35 U.S.C. 154(b). Patentee is given **TWO (2) MONTHS** from the mailing date of this decision to respond. No extensions of time will be granted under 37 CFR 1.136.

Patentee disputes the B delay period. Specifically, patentee asserts:

A notice of appeal was filed on May 25, 2007. The Office takes the position that the period of time from the filing of the notice of appeal until the day before the filing of the RCE (i.e., May 25, 2007 until October 30, 2007, inclusive of endpoints) should be deducted from the time period calculated in part (1) above. This time

period is equivalent to 159 days. In support of this position, the Office cites 35 U.S.C. 154(b)(1)(B)(ii), which provides that "any time consumed by appellate review by the Board of Patent Appeals and Interferences or by a Federal Court" (emphases added) is excluded from the calculation of B delay. However, appellate review does not commence upon the filing of a notice of appeal, but rather, upon the filing of an Examiner's reply to the applicant's Appeal Brief. No time was consumed by appellate review because no Examiner's reply had been filed. Thus, the time period from May 25, 2007 until October 30, 2007 should not be excluded from the calculation of B delay.

Petition, p. 2.

Patentee assertion is without merit. That is, patentee incorrectly calculated the period consumed by appellate review. The Office reminds patentee that the period consumed by appellate review, whether successful or not, is excluded from the calculation of B delay. See 35 U.S.C. 154(b)(1)(B)(ii).

Pursuant to 37 CFR 1.703:

(b) The period of adjustment under § 1.702(b) is the number of days, if any, in the period beginning on the day after the date that is three years after the date on which the application was filed under 35 U.S.C. 111(a) or the national stage commenced under 35 U.S.C. 371(b) or (f) in an international application and ending on the date a patent was issued, but not including the sum of the following periods:

(4) The number of days, if any, in the period beginning on the date on which a notice of appeal to the Board of Patent Appeals and Interferences was filed under 35 U.S.C. 134 and § 41.31 of this title and ending on the date of the last decision by the Board of Patent Appeals and Interferences or by a Federal court in an appeal under 35 U.S.C. 141 or a civil action under 35 U.S.C. 145, or on the date of mailing of either an action under 35 U.S.C. 132, or a notice of allowance under 35 U.S.C. 151, whichever occurs first, if the appeal did not

result in a decision by the Board of Patent Appeals and Interferences.

In this instance, the period consumed by appellate review is 159 days, beginning on the date on which the notice of appeal to the Board of Patent Appeals and Interferences was filed, May 25, 2007, and ending on the day before the filing of the RCE, October 30, 2007. Thus, B delay is 219 days (378 - 159).

Accordingly, the patent term adjustment is 478 days (468 days of A delay + 219 days of B delay - 209 days of applicant delay).

In view thereof, no change will be made in the revised determination of patent term adjustment at the time of the issuance of the patent.

Nothing in this decision shall be construed as a waiver of the requirement of 35 U.S.C. 154(b)(4) that any civil action by an applicant dissatisfied with a determination made by the Director under 35 U.S.C. 154(b)(3) be filed in the United States District Court for the District of Columbia within 180 days after the grant of the patent.

The Office acknowledges the previous submission of the \$200.00 fee set forth in 37 CFR 1.18(e). No additional fees are required.

Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3211.

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